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SUPREME COURT, U.S.

NO. 82-1857

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON,

Petitioner,

vs.

DWAYNE EARL BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

TIMOTHY K. FORD
2200 Smith Tower
Seattle, Washington 98104
(206) 622-5942

ATTORNEY OF RECORD

TIMOTHY K. FORD
2200 Smith Tower
Seattle, Washington 98104

DOUGLAS W. TUFTS
945 Market Street
Tacoma, Washington 98402

ATTORNEYS FOR PETITIONER
DWAYNE EARL BARTHOLOMEW

QUESTION PRESENTED

Whether the Supreme Court of Washington violated any provision of the federal Constitution by construing that State's unique capital sentencing statute in a manner which places some limit on evidence of non-statutory aggravating factors at the penalty phase of trial.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	3
Reasons for Denying the Writ	9
Conclusion	13
Appendix A Order Denying Motions for Reconsideration	A-1
Appendix B Sentencing Instructions and Verdict	B-1
Appendix C Sentencing Statutes	C-1

TABLE OF AUTHORITIES

Cases cited	Page
Barclay v. Florida, No. 81-6908	12
Commonwealth v. Ross, 195 A.2d 85 (Penn. 1963)	12
Delgado v. Connecticut, 408 U.S. 940 (1972)	12
Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1972)	2
Furman v. Georgia, 408 U.S. 238 (1972)	11,12
Gardner v. Florida, 430 U.S. 349 (1977)	11
Herb v. Pitcairn, 324 U.S. 117 (1945)	2
Jackson v. Georgia, 409 U.S. 1122 (1973)	12
Minnesota v. National Tea Co., 309 U.S. 551 (1940)	1
Moore v. Illinois, 408 U.S. 786 (1972)	12
Peeler v. Pennsylvania, 408 U.S. 934, rehearing denied 409 U.S. 897 (1972)	12
State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982)	passim
State v. Delgado, 290 A.2d 338 (Conn. 1971)	12
State v. Pain, 94 Wn.2d 387, 617 P.2d 720 (1980)	2
Williams v. New York, 337 U.S. 241 (1949)	11

Statutes, Court Rules and Constitutional Provisions	
Conn.Gen.Stat.Ann. §53-10 (1967	12
Georgia Code Ann. §27-2534 (1972)	12
18 Penn.Stat.Ann. §4701 (1959)	12
RCW 10.95.020	10
RCW 10.95.060(3)	3,10
RCW 10.95.060(4)	10
RCW 10.95.070	10
RCW 10.95.130(3)	8
28 U.S.C. §1257(3)	1
Washington State Constitution, Article 1 §14	2

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Respondent Dwayne Bartholomew respectfully urges the Court to deny the Petitioner's Application for a Writ of Certiorari.

OPINION BELOW

The opinion of the Supreme Court of Washington is accurately set out in Petitioner's Appendix A. Its Order Denying Motions for Reconsideration, dated February 10, 1983, is set out in Appendix A to this Brief.

JURISDICTION

The record here appears to adequately support jurisdiction under 28 U.S.C. §1257(3), as Petitioner claims. The decision below involved, and vindicated, "right[s] ... claimed under the Constitution of ... the United States," and speaks explicitly of the Eighth Amendment. "[T]he lower court opinion as a whole 'leaves the impression that the court probably felt constrained to rule as it did' by this Court's decisions." Minnesota v. National Tea Co., 309 U.S. 551, 554-5 (1940).

The record is not wholly free from ambiguity, however. The Washington Supreme Court has explicitly held its state constitutional prohibition of "cruel punishment" is "more protective than its federal counterpart." State v. Fain, 94 Wn.2d 387, 617 P.2d 720, 723 (1980). Though the decision in this case does not allude to the state constitution directly, throughout the State court clearly expresses its own "opinion[s]", "belief[s]", "considerations", "find[ings]" and "conclusions". 98 Wn.2d at 196-98. In such circumstances, should the Court find this case warrants its review, clarification of the record may be appropriate prior to any assumption of jurisdiction. See Dept. of Motor Vehicles v. Rios, 410 U.S. 425, 427, 430 (1972)(dissenting opinion of Justice Douglas); Herb v. Pitcairn, 324 U.S. 117 (1945).

STATUTES INVOLVED

The Petition correctly sets out certain applicable provisions of Washington law and the Federal Constitution. However, it does not fully set out the Washington capital sentencing statute at issue here. Respondent has therefore attached those statutes as Appendix C to this Brief.

As noted above, this case may also involve Article 1, Section 14 of the Constitution of the State of Washington, which provides "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

STATEMENT OF THE CASE

Because of substantial misstatements and omissions in the Petition, Respondent believes it necessary to more fully recount here the penalty proceedings and evidence in the courts below.[1]

Dwayne Bartholomew--a 21 year old man with no prior felony record--was sentenced to death after a sentencing hearing that lasted one half day and began the morning after his conviction for murdering Paul Edward Turner in the course of a robbery. Pursuant to RCW 10.95.060(3), the evidence at the penalty trial was largely open-ended.[2]

The State presented its case first. Its first witness was Stanley Bell, a twice-convicted burglar who, while in jail on new burglary charges, had briefly been the defendant's cellmate. RP 545.[3] Bell testified Bartholomew had told him "that he had made this guy lay down on the floor and he asked the guy how old he was, and the guy said 17[4], and he said, 'too bad' and shot him in the head." RP 546. Bell also testified Bartholomew "said if his brother testified against him he was going to kill him," and

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[1] A statement of facts regarding the evidence and proceedings relative to Respondent's conviction is contained in his Cross-petition for Certiorari, filed herewith.

[2] Just prior to the sentencing hearing, the trial court made what was to be its only ruling excluding any part of the State's proposed sentencing evidence: evidence regarding "the good character of the victim." RP 537.

[3] Consistent with Washington practice, the court reporter's transcript of proceedings below is referenced as Report of Proceedings (RP); papers filed in the trial court are contained in the Clerk's Papers (CP).

[4] Paul Edward Turner was 18. RP 501.

"said if I said anything that would hurt him, or something like that, I would be taken care of." RP 546-47. On cross-examination, Bell denied he had been made any promises in exchange for his testimony. RP 547.[5]

The State then called several witnesses regarding prior criminal acts the defendant had allegedly committed. Two of the witnesses identified Dwayne Bartholomew as the perpetrator of robberies of grocery stores where they worked, on two separate dates during the year prior to this crime. RP 548-9, 545-5. Neither of those crimes had resulted in charges or convictions. Both witnesses had picked the defendant out of a lineup conducted just prior to the trial of this charge. RP 551, 556.

A Tacoma Police officer was then called to testify to the facts surrounding his arrest of Dwayne Bartholomew on a misdemeanor trespass charge in September, 1980. *RP 550-9.* Another Tacoma Police officer testified regarding an incident in July, 1981, where the defendant was discovered unconscious in a cow pasture and, while being revived, "had jumped up and struck several of the fire fighters" and struck the officer "several times in the chest." RP 561-2. Documents reflecting assault charges filed as a result of that incident and pending at the time this crime, were also admitted into evidence. RP 563.

The State's last penalty phase witness was Dr. Donald Allison, a State psychiatrist who had interviewed the defendant under court order "for approximately one hour" and "left him with

---

[5] While this case was on appeal, Respondent's counsel learned that Bell's pending burglary charges had been reduced, and he was placed on probation and reinstated on parole. Counsel also learned a previous burglary charge had been dropped a few months before this trial, after Bell testified for the State in another case. Those facts were presented to the Washington Supreme Court in Appellant's Brief below. AOB at 26n.13.

an MMPI, which is a psychological test for him to answer and mail back to me at the hospital, which he did." RP 567. Dr. Allison testified he found the defendant "is competent" and "he is not insane" (RP 568)--although his MMPI scores were "so invalid from him pretending to be crazy that it was impossible to score." RP 570.[6] On cross-examination, when asked whether the defendant "would be a danger to others in prison," Dr. Allison said "I see no reason for him to stop committing crimes." RP 571.

The defense called one witness, Dr. William Conte, another psychiatrist.[7] Dr. Conte testified that in his opinion there was "a fifty fifty chance that the passage of time may modify some of the [defendant's] non-caring disinterested thinking and behavior" RP 579. He also opined that any danger the defendant presented would be limited by the fact "he would be institutionalized and a member of the prison population." RP 579-80.

The trial court's sentencing instructions were extremely brief.[8] They told the jury "the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency," but nowhere defined "mitigating circumstances". CP 124, Appendix B-4. They told the jury it was to "consider any relevant factors, including but not

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[6] In posttrial motions the defense offered to prove this examination had not been taken by the defendant, but by another inmate in his jail cell. CP 50.

[7] Defense counsel originally told the court--in front of the jury--it was his "intention to have the defendant take the stand" at the penalty phase. RP 581. But the defendant was not called. Defense counsel also told the court he expected to call another witness to testify about the defendant's "visits to her home and his general mental attitude as she observed it" over "about 12 years." RP 537. When the time came for this witness to be called, however, counsel indicated "my witness went back to work so there you are. It's no big deal." RP 581.

[8] The sentencing instructions are set out in full in Appendix B to this Brief.

limited to" five of the factors listed in the statute.[9] CP 125, App. B-5.

In argument, the prosecutor referred to these factors as "some guidelines, if you will, as to what things you might consider ...." RP 589. Defense counsel similarly told the jury "this is really an ethical problem for you to decide. It is not a legal one at all." RP 592.

The jury deliberated four hours before returning a verdict answering "yes" to the statutory sentencing question:

> Having in mind the crime for which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.

RP 601. The trial court accordingly imposed a sentence of death.

On appeal, the Supreme Court of Washington unanimously reversed the sentence. State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982). The majority decision on the death penalty issue began with a lengthy recapitulation of the history of capital punishment litigation in the Washington courts and in this Court, since 1968. 98 Wn.2d at 180-192. Reviewing the new

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[9] The five "factors" the court listed were:

> (1) Whether the defendant has or does not have a signficant history, either as a juvenile or an adult, of prior criminal activity;
>
> (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
>
> (3) Whether, at the time of the murder, the capacity of the defendant to apreciate [sic] the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;
>
> (4) Whether the age of the defendant at the time of the crime calls for leniency; and
>
> (5) Whether there is a likelihood that the defendant will pose a danger to others in the future.

Washington statute, it found it "conform[ed] in broad outline to approved schemes." 98 Wn.2d at 192. But it noted that the Washington statute was unusual in that "at the sentencing phase the jury may consider 'any relevant factors,'" and "[a]t least one federal court ... has recognized that the channeling of jury discretion is impaired by allowing the jury to consider nonstatutory aggravating information. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981)." 98 Wn.2d at 195. It then reasoned as follows:

> We agree with the reasoning of the Circuit Court. The factors which render a defendant liable for the death penalty are the statutory aggravating factors listed in RCW 10.95.020; unless at least one of such aggravating circumstances is found, the sentence may not constitutionally be imposed. For the objective of channeled discretion recognized in Gregg to be achieved, the statutory aggravating factor must be central to the jury's decision. If no nonstatutory aggravating factors are introduced, the reviewing court can readily conclude that a sentence of death was imposed because the jury decided that whatever mitigating evidence defendant produced did not outweigh the statutory aggravating factor. This conclusion becomes less reliable as more nonstatutory aggravating matters are put before the jury. Therefore, to maintain the jury's channeled discretion and to preserve meaningful appellate review of sentences, the nonstatutory aggravating information received by the jury should be limited.
>
> We do not, however, find it necessary that all nonstatutory aggravating information should be excluded. At least one nonstatutory aggravating factor is countenanced by the Supreme Court. In Gregg the Court recognized that the jury could inquire into defendant's "record of prior conviction for capital offenses." 428 U.S. at 197. Defendant's criminal record, therefore, does not appear to be "prejudicial" as that term applies in this context. Nor do we believe that allowing the jury to consider defendant's record of convictions impartial the channeling of the jury's discretion or prevents meaningful appellate review. A criminal record is reasonably objective, reliable information, and probably helpful to a jury in determining defendant's deservedness of death.
>
> Different considerations apply, however, where the prosecution seeks to put prior criminal activity other than convictions before the jury. Here, the element of prejudice looms larger. ***

> To allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions.
>
> We find no reason to allow the prosecution, without regard for the mitigating information presented by the defendant, to put before the jury any nonstatutory aggravating information, other than defendant's criminal record. The constitutional requirement of a channeled jury discretion demands that, if the defendant produces no mitigating evidence, the prosecution should be limited to the factors proved at the guilt phase together with the defendant's criminal record. To this extent, we adopt the Fifth Circuit Court's holding in Henry v. Wainwright, supra. We depart from Wainwright, however, in allowing consideration of defendant's criminal record and in one other respect.
>
> In our opinion, the prosecution should be entitled to produce information necessary to rebut mitigating evidence produced by defendant. ***

98 Wn.2d at 196-97.

> The special sentencing proceeding in which the defendant in this case was sentenced to die was tainted by these constitutional flaws we have identified. Evidence was admitted of criminal activity of which defendant had not been convicted. Nonstatutory aggravating information was not limited in the manner the Eighth Amendment requires. Therefore, the sentence of death imposed upon defendant is unconstitutional and invalid.

98 Wn.2d at 199.

The Washington court thus reversed Dwayne Bartholomew's sentence of death, without reaching several remaining challenges to it he had raised (98 Wn.2d at 193n.2, 201, 204n.3), and without reviewing it for proportionality under RCW 10.95.130(3).[10] Timely motions for rehearing submitted by both sides were denied

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[10] A four Justice "majority" remanded the case for imposition of a life sentence, while a five Justice "dissent" ordered a new penalty trial. 98 Wn.2d at 216, 226.

on February 10, 1983. Appendix A. By agreement of the parties, further proceedings in the trial court were stayed pending this Petition and Respondent's Cross-petition for Certiorari.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that, even if jurisdiction does lie here, the Court should decline to exercise it in this case for several reasons.

First, as noted in the discussion of jurisdiction above, the federal issue is not necessarily dispositive here. The state court's decision construing its capital sentencing statute is equally supportable on state or federal constitutional grounds. Additionally, several substantial, separate issues relating to the validity of Respondent's death sentence were explicitly reserved by the court below, in light of its primary decision. State v. Bartholomew, supra, 98 Wn.2d at 193n.2, 201, 204n.3. A contrary construction of the Eighth Amendment principles it discussed. on certiorari here, is unlikely even to change the appellate result in this particular case. This Court's resources are too limited to spend on a case in which they will have such doubtful effect.

Moreover, even if dispositive, the specific federal issue here is of limited importance. The Washington Supreme Court's construction of this peculiar death penalty statute does not present a sufficiently important question to warrant this Court's review.

Contrary to Petitioner's assertions, Washington does not have a "model death penalty provision ...." Petition at 10. As the court below noted, "[t]he Washington statute is not ... identical to any statute considered by [this] ... Court." State v. Bartholomew, supra, 98 Wn.2d at 187. Its differences from the more common Georgia- and Texas-type statutes are both "significant" and "substantial". Id. at 98 Wn.2d 190.

Under the Washington law, all statutory "aggravating circumstances" are proven at the guilt phase, not the sentencing phase, of trial. RCW 10.95.020. The issues at the sentencing phase of trial are wholly open-ended. The sentencing body is authorized to "consider any relevant factors, including but not limited to" eight listed in the statute. RCW 10.95.070. The court is required to

> admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as the result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

RCW 10.95.060(3). Though the statute nowhere denominates what sentencing considerations are to be considered "aggravating" or "mitigating," the sentencing authority returns a special verdict on a statutory question phrased in terms of mitigation: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4). That is the only verdict it returns; the statute makes no provision for a verdict on the apporpriateness of life or death.

The proceedings at sentencing in this case were even more unique and aberrant than this statute is. The jury's guilt verdict failed to reflect which of the statutory elements of aggravated murder it had found. See State v. Bartholomew, supra, 98 Wn.2d at 193n.2. The trial judge instructed the jury on five of the eight statutory "relevant factors", but not the others. CP 125. And though the jury was required to render its verdict on the existence of "mitigating circumstances," it was given no instruction on what a "mitigating circumstance" was. Ibid.

No other state statute leaves the issues at sentencing so totally open-ended, eliminates the rules of evidence and permits proof of all "previous criminal activity" regardless of its prior adjudication, and makes the sentencing decision turn on a simple "yes" or "no" answer to a statutory question, the terms of which are nowhere defined in the law or the instructions to the jury. In no other trial conducted under that statute have its defects been so glaringly evidence as they were in this one.

The Supreme Court of Washington's decision construing this unique statute in a manner more consistent with the statutes this Court has upheld, and invalidating the death sentence imposed in this particularly deviant proceeding, involves issues of little importance beyond the boundaries of this state and the record of this case. This Court's certiorari jurisdiction does not lie to review such matters.

Petitioner's major argument for review appears to be that the decision below conflicts with Williams v. New York, 337 U.S. 241 (1949), which it reads to stand for the proposition that "sentencing authorities [should] receiv[e] the most diverse information available." Petition at 12. Of course, Williams was overruled on precisely this point in Gardner v. Florida, 430 U.S. 349 (1977). Petitioner's apparent ignorance of Gardner similarly explains its concern with the supposed anomoly that, under the decision below, capital sentencing authorities are not privy to the full range of information available to sentencers in non-capital cases. Gardner, and Furman v. Georgia, 408 U.S. 238 (1972) clearly held that because "death is a different kind of punishment than any other which may be imposed in this country,"

such unique constitutional limits apply to capital sentencing hearings. The result below is no anomoly, but the natural, logical, constitutionally indispensible result of that.

The decision below fully accords with this Court's decisions since Furman. Indeed, its invalidation of this wholly open-ended, undirected capital sentencing proceeding would appear to be compelled by this Court's decisions after Furman. This Court unanimously invalidated a number of death sentences imposed after similarly open-ended penalty proceedings after Furman and Moore v. Illinois, 408 U.S. 786, 800 (1972). See, e.g. Delgado v. Connecticut, 408 U.S. 940 (1972), vacating State v. Delgado, 290 A.2d 338 (Conn. 1971) [see Conn.Gen.Stat.Ann. §53-10 (1967]; Scoleri v. Pennsylvania, 408 U.S. 934, rehearing denied 409 U.S. 897 (1972) [see 18 Penn.Stat.Ann. §4701 (1959) and Commonwealth v. Ross, 195 A.2d 85, 86 (Penn. 1963)]; Jackson v. Georgia, 409 U.S. 1122 (1973) [see Georgia Code Ann. §27-2534 (1972)].

The sentencing proceeding in this case was indistinguishable from those conducted in these cases. Absent the kind of limiting construction placed on the Washington statute by the court below, it would be indistinguishable from these invalid pre-Furman laws. No conflict between the decision below and this Court's decisions has been demonstrated, because none exists.

Insofar as any uncertainty remains as to the Eighth Amendment principles surrounding this issue, they will likely be clarified soon by the pending decision in Barclay v. Florida, No. 81-6908. Respondent expects Barclay will squarely reaffirm the principles applied by the court below, eliminating any conceivable grounds for review in this case. If it does not, the case can be remanded for reconsideration in its light. Even in that event, which Respondent does not anticipate, no purpose would be served by a separate grant of certiorari here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY K. FORD
ATTORNEY FOR RESPONDENT

APPENDIX A

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,
v.
DWAYNE EARL BARTHOLOMEW,
Appellant.

No. 48346-9

ORDER DENYING MOTIONS FOR RECONSIDERATION

The Court having decided by majority vote that the appellant's motions for reconsideration and clarification and the respondent's motion for reconsideration and other relief should be denied,

It is ordered that the motions be and they hereby are denied.

Dated this 10th day of February, 1983.

Chief Justice

98 Wn.2d 173

APPENDIX B

Sentencing Instructions and Verdict

(CP 121-127, 189)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

DEC - 7 1981

STATE OF WASHINGTON,

Plaintiff,

vs.

DWAYNE EARL BARTHOLOMEW,

Defendant.

NO. 81 1 00579 1

FILED
DEPT. 8
IN OPEN COURT
DEC - 7 1981
BRIAN [illegible], Clerk
By [illegible]
DEPUTY

SPECIAL SENTENCING PROCEEDINGS

COURT'S INSTRUCTIONS TO THE JURY

W. L. BROWN, JR., JUDGE

INSTRUCTION NO. 1

It is your duty to determine the facts at this special sentencing proceedings from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits offered and received. It has been my duty from time to time throughout the trial to rule on the admissibility of evidence. You, however, must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law as given to you by the court.

The law does not permit me to comment on the evidence, and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard such comment entirely.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by him or his adversary.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In determining what credit is to be given any witness you may take into account the ability and opportunity to observe, the memory, manner and appearance while testifying, any interest, bias or prejudice and the reasonableness of the testimoney of such witness considered in the light of all the evidence, and any other factors that bear upon believability and weight.

INSTRUCTION NO. 2

During these special sentencing proceedings, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The question you are required to answer is as follows:

"Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

If you unanimously answer "yes" the sentence will be death. If you do not unanimously answer "yes", or if you unanimously answer "no" the sentence will be life imprisonment without the possibility of parole.

In deciding the question posed, you may consider any relevant factors, including, but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether, at the time of the murder, the capacity of the defendant to apreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(4) Whether the age of the defendant at the time of the crime calls for leniency; and

(5) Whether there is a likelihood that the defendant will pose a danger to others in the future.

Life imprisonment without the possiblity of release or parole means that: 1) the individual shall not have that sentence suspended, deferred, or commuted by any judicial officer; 2) the

Board of Prison Terms and Paroles shall never parole the individual or reduce the period of confinement; 3) the person shall not be released as a result of any type of good time.

The death penalty means that the person shall be executed by hanging or by lethal injection.

INSTRUCTION NO. 4.

Because you have found the defendant Dwayne Earl Bartholomew guilty of aggravated murder, you have been reconvened for this special sentencing proceedings.

It will be your duty to decide, under Washington law, a certain factual question and the defendant shall be sentenced in accordance with your factual determinations.

Upon retiring to the jury room for your deliberation of this case, your first duty is to elect a foreperson to act as chairperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and one sentencing verdict form.

You must answer one question. All twelve of you must agree before you can answer the question "yes". If all twelve of you so agree the foreperson should sign Sentencing Verdict. If all twelve of you do not so agree or if all twelve of you agree that the answer to the question should be "no" then your foreperson will answer the question "no".

After your foreperson signs the verdict form, notify the bailiff who will conduct you into court to declare your verdict.

You will now listen to the argument of counsel.

JUDGE

R:C82sc 1rc182

1381

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. DWAYNE EARL BARTHOLOMEW, Defendant.	No. 81-1-00579-1 SENTENCING VERDICT

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

/ Yes

____ No

FOREPERSON

FILED
DEPT. 8
IN OPEN COURT
DEC - 1 1981
BRIAN SCHULTAS, Clerk
By DEPUTY

APPENDIX C

Revised Code of Washington (1982 Supp.)

§10.95.060 Special sentencing proceeding--Jury instructions--Opening statements--Evidence--Arguments--Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

§10.95.070 Special sentencing proceeding--Factors which jury may consider in deciding whether leniency merited

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, or prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency;

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

§10.95.080 Special sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

82-1857

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON,

Petitioner,

vs.

DWAYNE EARL BARTHOLOMEW,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Dwayne Earl Bartholomew, by his undersigned counsel, asks leave to file the Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Washington, without prepayment of costs, and to proceed in forma pauperis pursuant to the provisions of Rule 46 of the Rules of this Court.

This motion is based on the attached affidavit of Dwayne Earl Bartholomew, who is presently incarcerated in the Washington State Reformatory Special Offender Center, Monroe, Washington.

Timothy R. Ford
2200 Smith Tower
Seattle, Washington 98104
(206) 622-5942

ATTORNEY FOR RESPONDENT

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

STATE OF WASHINGTON,

Petitioner,

vs.

DWAYNE EARL BARTHOLOMEW,

Respondent.

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

DWAYNE EARL BARTHOLOMEW, being duly sworn on oath deposes and states:

1. I am a citizen of the United States and the Respondent/Cross-petitioner in the above entitled action.

2. I desire to respond and to Cross-petition for a Writ of Certiorari directed to the Supreme Court of the State of Washington to review the judgment of that Court entered on November 24, 1982, pursuant to 28 U.S.C. §1257(3), but because of my poverty I am unable to pay the costs of such proceeding or give security therefor.

3. I have been held by the authorities of the State of Washington in close confinement since August 5, 1981, and at the present time I am incarcerated in the Washington State Reformatory at Monroe, Washington. I have no employment and no assets of any kind. In all proceedings in the state courts I have been represented by counsel at public expense.

4. I believe that I am entitled to the relief I seek by Cross-petition for Writ of Certiorari, and that such Writ presents substantial questions.

WHEREFORE affiant prays that he may have leave to proceed in this Court on his Cross-petition for Writ of Certiorari in forma pauperis.

Dwayne Earl Bartholomew
DWAYNE EARL BARTHOLOMEW

SUBSCRIBED AND SWORN to before me this 27th day of April, 1983.

Margaret Gordon
NOTARY PUBLIC in and for the
State of Washington, residing at

My commission expires Authorized Officer pursuant to
RCW 64.08.090

Residing at Marysville